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Supreme Court, U.S.
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No. 09-39

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In The

Supreme Court of the United States

DUFRENE BOATS, INC.,

Petitioner,

v.

NGA TRINH, INDIVIDUALLY AND ON BEHALF OF HAO TRAN AND LYNN TRAN,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana First Circuit Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), this Court analyzed the conflict between maritime and state remedies for wrongful-death in territorial waters and defined "seafarer" as a threshold determination of whether maritime uniformity and maritime remedies should be paramount over state interests and state remedies. Subsequent federal and state court decisions have developed inconsistent interpretations of "seafarer" which have led to anomalous results. Only this Court can resolve this conflict with a clear definition of "seafarer" to aid the lower courts in determining when maritime uniformity and maritime remedies are paramount over state interests and state remedies. The inconsistent results will continue until this Court answers the question presented:

Whether a person engaged in a maritime trade, who is not a seaman or a longshore worker, is a "seafarer" under *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), which would require application of maritime uniformity and maritime remedies over state interests and state remedies in a maritime wrongful-death case in territorial waters.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption of this Petition.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states it has no parent or publicly held company owning 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Louisiana First Circuit Court of Appeal (App. 1-29) is reported at 6 So.3d 830 (La. App. 1 Cir. 2009). The judgment and opinion of the Louisiana 16th Judicial District Court (App. 38-42) denying petitioner's Motion for Partial Summary Judgment on the non-pecuniary claim is unreported. The judgment and opinion of the 16th Judicial District Court (App. 30-37) on the main demand is unreported. The opinion of the Louisiana Supreme Court (App. 43) denying an Application for Writ of Certiorari is reported at 5 So.3d 166 (La. 2009).

JURISDICTION

The Louisiana First Circuit Court of Appeal's judgment was entered on January 22, 2009. A timely Application for Writ of Certiorari to the Louisiana Supreme Court was denied on April 13, 2009. (App. 43). No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2 of the U.S. Constitution provides in relevant part:

"[t]he judicial [p]ower [of the United States] shall extend . . . to all [c]ases of admiralty and maritime [j]urisprudence".

28 U.S.C. §1333 states in pertinent part:

"The District courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT OF THE CASE

Introduction

This case raises important, recurring questions relating to federal maritime law that have not been, but should be, settled by this Court. The Petition addresses the issues of uniformity within the general maritime law and coexistence with state law remedies under the savings-to-suitors clause. Within the context of maritime uniformity and state law applicability is the need for this Court to bring clarity to the term "seafarer". Many lower federal courts have found persons engaged in a maritime trade who are not seamen or longshore workers "seafarers" according to *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 1999 (1996), and held the principle of maritime uniformity paramount over state interests. However, other courts, like the state court below, have found the

same persons "non-seafarers" and held state interests paramount over maritime uniformity according to *Yamaha, id.* Thus, we have a significant conflict which leaves litigants and their counsel in a quandary as to which set of laws to apply, maritime or state, when determining remedies. Maritime law restricts recovery to pecuniary damages. State law may allow the additional recovery of non-pecuniary damages. The impact of which law applies is significant and why this Court should address and clarify the issues.

The issues set forth in this Petition are also compelling because they impact all self-employed maritime workers in the United States and owners of all vessels calling on American ports and dock facilities. The unresolved issues have created a number of conflicting decisions by both federal and state courts as they grapple with the language discussing the scope of "seafarer" in *Yamaha*. The first scope of seafarer incorporates three distinct groups: seamen, longshore workers **and** persons otherwise engaged in a maritime trade. *Id.*, at 202. The second scope, which the state court below adopted, incorporates just two groups: seamen and longshore workers, and excludes "persons otherwise engaged in a maritime trade." *Id.*, at 205, n. 2. The conflicting decisions evolving around the coexistence of general maritime law uniformity and state interests, together with the quandary of who is a seafarer under *Yamaha*, have percolated for thirteen years. The time is ripe for this Court to address

the maritime uniformity/state law issue, clarify who is a "seafarer", and end the conflicting decisions.

A. A Maritime Collision Between Commercial Vessels in Territorial Waters

Thuan Tran ("Tran") was a self-employed commercial crab fisherman who owned his crab-fishing vessel and was engaged in his profession in Louisiana territorial waters when he met his unfortunate death during a maritime collision between his vessel and a commercial tug boat, owned and operated by petitioner, Dufrene Boats, Inc. ("Dufrene"), and its tow of barges. Respondent, Nga Trinh, the wife of Tran, as personal representative of her husband's estate, filed suit in the Louisiana 16th Judicial District Court seeking pecuniary and non-pecuniary damages under the Louisiana wrongful-death statute.

B. State District Court Denies Motion for Partial Summary Judgment Seeking Dismissal of State Remedies

Petitioner filed a Motion for Partial Summary Judgment seeking dismissal of the non-pecuniary damage claim alleging that those damages were not recoverable by Tran's family since Tran was a person engaged in a maritime trade, crab fishing, at the time of his death. The District Court denied petitioner's Motion finding that Tran, the commercial fisherman, was a "non-seafarer" as that term is defined in *Yamaha*. App. 38-42.

C. State District Court Awards Non-Pecuniary Damages

After a non-jury trial on the merits, the District Court awarded non-pecuniary damages. App. 30-37.

D. Louisiana Appellate Court Holds Tran Is A Non-Seafarer And State Interests Prime The General Maritime Uniformity Principle

The Louisiana First Circuit Court of Appeal affirmed the District Court's finding that Tran was a "non-seafarer" and award of non-pecuniary damages because state law primed maritime uniformity in this maritime collision between commercial vessels in territorial waters. App. 1-29.

E. The Louisiana Supreme Court Denies Application For A Writ Of Certiorari

Petitioner filed a timely Application for Writ of Certiorari to the Louisiana Supreme Court which was denied on April 13, 2009. App. 43.[1]

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[1] Respondent's Application for a Writ of Certiorari for other reasons was also denied.

REASONS FOR GRANTING WRIT

I. A Current Lack Of Uniformity In The General Maritime Law And Inconsistent Interpretations Of "Seafarer" Have Caused Conflicting Decisions Affecting The Entire Maritime Industry

This case raises issues that have been percolating in the state and federal courts since *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). Is a self-employed maritime worker who is not a seaman or longshore worker but engaged in a commercial maritime activity at the time of his death a "seafarer", akin to seamen and longshore workers whose trades also involve a commercial maritime activity? Or, is the same self-employed maritime worker a "non-seafarer", akin to a recreational boater and recreational fisherman whose trades do not involve a commercial maritime activity? The Louisiana state court below held the self-employed maritime worker, a commercial fisherman, was a non-seafarer. However, the answers to these questions by our federal and state courts have provided inconsistent decisions. For those courts determining the self-employed maritime worker is a person within the scope of "seafarer", the principle of maritime uniformity controlled and recovery was limited to pecuniary damages as set forth in maritime law. For those courts holding the self-employed maritime worker is not a person within the scope of "seafarer", the principle of state interests controlled and recovery for non-pecuniary damages, based upon applicable state law, was allowed. The

conflicting decisions will not end until this Court speaks.

Article III, Section 2 of the U.S. Constitution gives the federal courts the authority to develop a substantive body of law applicable to cases within the admiralty and maritime jurisdiction. During the thirteen years since *Yamaha* was decided, our federal and state courts have reached conflicting decisions while attempting to analyze the *Yamaha* decision, in particular the analysis of maritime uniformity co-existing with state interests. Additionally, *Yamaha* introduced the term "seafarer". One would think the definition is simple to determine. However, the lower courts have had significant difficulty and contrasting views. As a result, uncertainty and inconsistency exist in our federal courts and our state courts which hear cases under the jurisdiction of 28 U.S.C. §1333(1), the savings-to-suitors clause. The ambiguity of "seafarer", which has created a lack of uniformity in admiralty law, affects every self-employed maritime worker in the United States and every vessel owner whose equipment calls on our ports and dock facilities. The time is ripe for this Court to accept its constitutional duty, review the issues raised in this Petition, provide substantive maritime law which will bring uniformity to the general maritime law and end the inconsistent decisions from our lower federal and state courts.

We must not forget the "constitutionally based principal that federal admiralty law should be a 'system of law co-extensive with, and operating uniformly

in, the whole country.'" *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970) (*The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)). The maritime uniformity doctrine is designed to promote consistency, and thus predictability, in maritime commerce. From *The Lottawanna*, the earliest expression from this Court of the uniformity concept, through the numerous maritime legislative statutes, such as the Jones Act, 46 U.S.C. §30104, and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, and up to the *Yamaha* decision, a desire for uniformity has been intertwined with the promotion of commerce on our nation's navigable waterways. *See generally*, Robert Force, *Post Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L. J. 7, 37-40 (1996). The *Yamaha* Court noted the driving concern behind *Moragne* was a push for "uniform access by seafarers to the unseaworthiness doctrine." 516 U.S., at 627, n. 10; *see also Moragne*, 398 U.S., at 396, n. 12. *Moragne* was expressly intended to advance the principle of uniformity. *See Moragne*, 198 U.S., at 401 ("our recognition of a right to recover for wrongful-death under general maritime law will assure uniform vindication of federal policies . . . "). It is counterproductive to the maritime principle of uniformity that a self-employed person involved in a maritime commercial activity is more akin to a recreational boater than to a seaman or longshore worker. It is reasonable to conclude that when non-seafarers are involved, e.g. the recreational boater or recreational fisherman, the likelihood of significant maritime commercial involvement is remote.

When non-seafarers are killed in territorial waters, maritime interests are not paramount. It is reasonable to conclude from *Yamaha* that state interests outweigh the need for maritime uniformity in such a context. (*See*, *Yamaha*, 516 U.S., at 211, n. 8, "The federal cast of admiralty law, we have observed, means that 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the states a wide scope.' *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959)"). However, when a person who is engaged in maritime commerce, e.g. a self-employed commercial fisherman, is killed in territorial waters, it is reasonable to conclude from *Yamaha* the implication of uniformity in federal maritime law is paramount and should control over state interests. *Id.* Today, as a result of the different interpretations of "seafarer" in the *Yamaha* decision, our federal and state courts are not co-extensive, nor are they operating uniformly. Therefore, review by this Court is warranted.

II. The Decision Below Reflects Widespread Uncertainty Over The Application Of The Maritime Principle Of Uniformity And The Term "Seafarer" Introduced In *Yamaha* Which This Court Alone Can Dispel

Supreme Court Rule 10 states that "a Writ of Certiorari is not a matter of right, but judicial discretion." Rule 10 further states that a Petition's character may be looked upon with favor if "a state court

. . . has decided an important question of federal law that has not been, but should be, settled by this Court or decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). This case squarely presents issues within the parameters of Rule 10(c) because the *Yamaha* decision "unnecessarily open[ed] a proverbial Pandora's Box of issues that must ultimately be resolved by this Court." Hugo Coelella, *The Secret Dissent in Yamaha Motor Corp., U.S.A. v. Calhoun – Never Before Published!*, 71 Tul. L. Rev. 203, 210 (1996). This Petition addresses issues opened by *Yamaha* which must be resolved by this Court. Moreover, the Louisiana First Circuit Court of Appeal emphasized below that state courts are not required to follow the lower federal courts. Rather, "state courts are bound only by decisions of the U.S. Supreme Court". *Trinh v. Dufrene Boats, Inc.*, 6 So.3d 830, 842 (La. App. 1 Cir. 2009), *cert. denied*, 5 So.3d 166 (La. 2009). The court below correctly recognized that this Court alone can dispel the widespread uncertainty.

A. This Court's Precedents And Statutory Authority Support Uniformity In Maritime Wrongful-Death Causes Of Action

Maritime death actions may be brought under both the general maritime law and statute. Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6(1-3) at 425-441 (4th Ed. 2004). The circumstances of each case will give rise to different remedies. *Id.*

There are four primary theories of recovery:

(1) The Jones Act, 46 U.S.C. §30104 *et seq.*, covers seamen in the course of employment and incorporates wrongful death provisions of the Federal Employer's Liability Act (FELA), 45 U.S.C. §51-60. The Jones Act provides a right of action against the seaman's employer for recovery of pecuniary damages for injury or death. An employer/employee relationship is required. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 394 (1970).

(2) The Death on the High Seas Act (DOHSA), 46 U.S.C. §3301 *et seq.*, provides a wrongful death action to the beneficiaries of any person, seaman or non-seaman, when the death is caused by a wrongful act occurring on the high seas. The damages are limited to pecuniary loss. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 620 (1978).

(3) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 *et seq.*, allows longshoremen and other qualifying maritime workers to bring an action under general maritime law for deaths caused by negligence of others. 33 U.S.C. §901-950.

(4) The non-statutory remedy provided under the general maritime law, which allows a common law recovery to individuals killed in maritime cases and who are not

> Jones Act seamen or longshoremen under the LHWCA and who are not subject of DOHSA due to the location of the death. *See Moragne*, 398 U.S., at 409. An action "lie[s] under general maritime law for death caused by violation of maritime duties".

The history of maritime wrongful-death claims begins with *The Harrisburg*, 119 U.S. 199 (1886), where the Supreme Court established the rule that the general maritime law did not afford a cause of action for wrongful-death. *Id.*, at 199. This ruling stemmed from the English common-law belief that the law did not allow recovery for injuries resulting in death. *See*, *Yamaha*, 516 U.S., at 206. Later, the Supreme Court held in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), that "when admiralty adopts a state's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached." *Yamaha*, at 209 (quoting *The Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959)). Therefore, a seafarer would be precluded under a state's wrongful-death statute from recovering under the generous liability standard that the unseaworthiness doctrine provides because that doctrine is not recognized in most state wrongful-death statutes. *See*, *Moragne*, 398 U.S. 375, 377 (1970).

Moragne recognized a general maritime wrongful-death action. *Id.*, at 393. Thereafter, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the

Supreme Court held that under the general maritime law a seaman could not recover non-pecuniary damages. Since non-pecuniary damages were not included in FELA, which was incorporated by Congress into the Jones Act, the Court indicated that Congress intended to include only pecuniary losses under the Jones Act as well. *Id.*, at 32. Thus, the *Miles* Court held that non-pecuniary damages were not available to a seaman under the general maritime law. *Id.*, at 33.

B. The Unpredictability After *Yamaha* Is Recurring And Of Great Practical Importance

While on vacation with her family, teenager Natalie Calhoun was killed when the jet-ski she was riding slammed into an anchored vessel in Puerto Rico's territorial waters. *Yamaha*, 516 U.S., at 201. Back home in Pennsylvania, her parents brought a wrongful-death suit against Yamaha, the manufacturer of the jet-ski, alleging defective manufacturing. *Id.*, at 201-202. The question presented to this Court was "does the federal maritime claim for wrongful-death recognized in *Moragne* supply the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters?" *Id.*, at 205. The Court noted that "with admiralty jurisdiction . . . comes the application of substantive admiralty law." *Id.*, at 206, quoting, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). However, admiralty jurisdiction "does not result in the automatic displacement of state law." *Id.*, quoting

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545 (1995). Unfortunately, the admiralty case law had not set forth a clear analysis of what to do when the co-extensive system is threatened. *Yamaha*, 516 U.S., at 210, n. 8. The ultimate conclusion by the *Yamaha* court was that *Moragne* did not displace the state-law remedies for non-seafarers killed in territorial waters. *Yamaha*, 516 U.S., at 214. Thus, non-seafarers killed in territorial waters may recover non-pecuniary damages if allowed by the applicable state wrongful-death statute. Seafarers are limited to general maritime law remedies.

The use of the term "seafarers" as a class who are limited to exclusive maritime law remedies and use of the term "non-seafarers" as a class who can avail themselves of state-law remedies have fueled the forces which either seek to expand or seek to constrict plaintiffs' rights.

In a footnote, the Supreme Court stated:

> "By 'non-seafarers' we mean persons who are neither seamen covered by the Jones Act, nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act." *Id.*, at 205, n. 2.

Yet, earlier in the main body of the opinion, in the all important paragraph setting forth the *Yamaha* holding, the court gave a different interpretation:

> Traditionally, state remedies have been applied in accident cases of this order – maritime wrongful-death cases in which no

> federal statute specifies the appropriate relief **and** the decedent was not a seaman, longshore worker, **or person otherwise engaged in a maritime trade**. (Emphasis added.) We hold . . . that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Id.*, at 202.

Whether a maritime worker is a "seafarer" or a "non-seafarer" depends upon how the Supreme Court intended the terms to be defined. The problem federal courts and state courts have faced is trying to determine the intent of this Court as to the scope of "seafarer". Does "seafarer" include only seamen and longshore workers? Does "seafarer" also include "persons otherwise engaged in a maritime trade"? The lower federal courts and state courts are not consistent. The Louisiana courts below decided that a self-employed commercial fisherman was not a "seafarer". Other courts have reached the opposite conclusion under near identical facts. This is why a person engaged in a maritime trade who is not a Jones Act seaman or a longshore worker and a commercial vessel operator do not know if the maritime worker is a "seafarer" or a "non-seafarer". The Supreme Court needs to provide guidance as to its intent in *Yamaha* to clarify the scope of "seafarer". Today uncertainty reigns throughout the federal and state courts; and, litigants are forced to literally roll the dice as to which category a court will apply.

C. The Decision Below Reflects Widespread Inconsistency Interpreting *Yamaha*

Since *Yamaha* has created so much uncertainty for litigants and the courts, it is not surprising courts have rendered inconsistent, conflicting decisions. Cited below are cases which establish a lack of uniformity and predictability in our federal and state court systems when addressing the question of whether *Yamaha* establishes an exclusive maritime remedy for wrongful-death of persons who are not seamen or longshore workers, but who are engaged in a maritime trade in territorial waters.[2]

In three federal district court decisions involving the death or injury of self-employed commercial fishermen in territorial waters, and relied upon by

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[2] There is a plethora of commentary on the maritime uniformity issue following *Yamaha*. *See, e.g.*, Lizabeth L. Burrell, *Uniformity of Maritime Law and the Supreme Court: Till Death Do Us Part*, 25 Tul. Mar. L. J. 153 (2000); Christopher P. Graham, *Yamaha Motor Corp. v Calhoun: The Court Refuses to Drown State Wrongful-Death Remedies for Nonseamen*, 19 Hous. J. Int'l L. 519 (1997); W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355 (2001); Louis G. Spencer, *In re Goose Creek Trawlers, Inc.: Wards of the Court? With Friends Like These, Who Needs Enemies? Exploring the Nature of the Yamaha Exception*, 22 Tul. Mar. L. J. 693 (1998); Anthony D'Alto, *Deciphering the Applicable Substantive Law to Apply to Maritime Wrongful Death and Personal Injury Cases in the Wake of Yamaha Motor Corp. v. Calhoun*, 34 New Eng. L. Rev. 981 (2000); Robert Force, *Post Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L. J. 7 (1996).

petitioner in the case below, the courts all held a self-employed commercial fisherman was a "seafarer" because he was a person engaged in a maritime trade. *In re Goose Creek Trawlers, Inc.*, 972 F. Supp. 946 (E.D.N.C. 1997); *In re Complaint of Stone Energy Corp.*, 2003 WL 21730621 (E.D. La. 2003); and, *Savoie v. Chevron Texaco*, 2005 WL 2036740 (E.D. La. 2005).

In re Goose Creek Trawlers, Inc., 972 F. Supp. 946 (E.D.N.C. 1997) is illustrative for critical analysis. The F/V HALEY CLARK, a seventy-five foot fishing vessel, owned by Goose Creek Trawlers ("Goose Creek"), collided with the F/V LITTLE FELLOW, owned and operated by Bruce Spain, a self-employed commercial shrimper. *Id.*, at 947. The LITTLE FELLOW sank and Spain died. *Id.* Goose Creek filed a Complaint for exoneration or limitation of liability; and, subsequently, Spain's estate filed a counterclaim for wrongful-death asserting causes of action under general maritime law and North Carolina's wrongful-death and survival statute. *Id.* The district court found federal maritime uniformity paramount and limited the decedent's representative to pecuniary damages, the exclusive general maritime law remedy. *Id.*, at 950. The court addressed an issue presented in this Petition: whether a self-employed commercial fisherman is a "seafarer" for purposes of determining relief in a commercial maritime casualty in territorial waters. When conducting its analysis, the *Goose Creek* court observed there was no employer/employee relationship between Spain and Goose Creek;

therefore, the statutory remedies of the Jones Act were not applicable. *Id.*, at 948. The court also noted that the Death on the High Seas Act (DOHSA) was not applicable because the accident occurred in North Carolina waters. *Id.* Finally, the LHWCA did not apply to Spain because he was not a longshoreman or other enumerated worker. *Id.* The court next turned to *Yamaha,* and recognized that "traditionally, state remedies have been applied in accident cases of this order – maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade." *Id.*, at 950. The Court focused on Spain's trade as a commercial fisherman and found the decedent was a "person otherwise engaged in a maritime trade." *Id.* As a result, it did not matter that Spain fell outside the scope of the Jones Act and the LWHCA because "the plain defining language in *Yamaha* prevents [Spain] from benefitting under the narrow exception for non-seafarers." *Id.* Spain was prohibited from recovering non-pecuniary damages because the case was governed by *Miles* which required the court to comply with the "constitutionally based principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformally in, the whole country.'" *Id.*, quoting *Miles*, 498 U.S. 27 (1990).

Two district courts in the Fifth Circuit interpreted *Yamaha* consistently with the Fourth Circuit *Goose Creek* district court. In *In re Complaint of Stone*

Energy Corp., 2003 WL 21730621 (E.D. La. 2003), Ryan Robin, a commercial crabber, died as a result of an allision between his crab-fishing boat and a tug in Barataria Bay (Louisiana waters). Robin was engaged in commercial crabbing at the time of the casualty. The court found that Robin was "engaged in the maritime trade" of crab fishing. Therefore, following the U.S. Supreme Court precedent in *Moragne*, *Miles* and *Yamaha,* the court held that non-pecuniary damages were not available to Mrs. Robin and her children.

In *Savoie v. Chevron Texaco*, 2005 WL 2036740 (E.D. La. 2005), the court was asked to dismiss the non-pecuniary damage claims brought by the wife and children of a self-employed fisherman who was injured while trawling for shrimp in Bayou Terrebonne (Louisiana waters). The fisherman's nets hung up on a piling, and he alleged property and personal injury damages. The fisherman's wife, on her own behalf and on behalf of their minor children, sought recovery for loss of consortium, service, society and support: all non-pecuniary damages. Following removal, defendants brought a Motion for Partial Summary Judgment seeking dismissal of the non-pecuniary damage claim. The court determined that, even though he was self-employed, the plaintiff's occupation as a commercial fisherman categorized him as a "seafarer" who was "engaged in a maritime trade" under the definition set forth in *Yamaha.* Accordingly, the fisherman's wife and her children

were precluded from recovering non-pecuniary damages.

In *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1997), the Ninth Circuit held that a self-employed marine surveyor was a seafarer. *Id.*, at 1060. In *Ghotra*, the self-employed marine surveyor "satisfied the status and situs tests for coverage under the LHWCA," despite the absence of a "master-servant" relationship. *Id.*, at 1059. The Ninth Circuit found a seafarer to be any one of the three *Yamaha* categories: "[*Yamaha*] held that *Moragne* does not preempt application of the state wrongful death remedies in accident cases where the decedent is not a seaman, longshore worker or person otherwise engaged in a maritime trade." *Id.*, at 1058.

In other cases where non-seafarer status was much clearer, the courts have applied *Yamaha* to allow incorporation of state-law remedies. In *American Dredging v. Lambert*, 81 F.3d 127 (11th Cir. 1996), and in *Florida Power & Light Co. v. Polackwich*, 677 So.2d 880 (Fla. App. 2 Dist. 1996), the courts held that Florida law governed the wrongful-death of recreational sailors and motor boaters. The rationale given in both decisions is an axiomatic corollary from *Yamaha*. The *Florida Power & Light* court found that *Yamaha* holds that in a maritime wrongful-death case not otherwise governed by federal statute, if the decedent is not a seaman, longshore worker, or other maritime tradesperson, state wrongful-death remedies serve as the damages for the federal claim. *Id.*, at 882. By making this statement, the *Florida Power &*

Light court included *Yamaha's* third class, persons engaged in a maritime trade, within the scope of persons who are "seafarers".

Other courts have interpreted *Yamaha* as setting forth a more restrictive view of who is a seafarer. In *Juno Marine Agency, Inc. v. Taibl*, 761 So.2d 373 (Fla. App. 3 Dist. 2000), Taibl, a maritime worker by trade, answered a distress call from a nearby ship to which he had no employment relationship. He died after entering the other ship's tank filled with carbon dioxide. The state court allowed supplementation of maritime remedies by the Florida law of wrongful-death because Taibl "died on Florida territorial waters in an accident neither covered by the Jones Act, the Longshoremen and Harbor Workers' Compensation Act, nor Death on the High Seas Act." *Id.*, at 374. The Florida Third District Court of Appeal, like the Louisiana First Circuit Court of Appeal in the instant case, accepted the more restrictive reading of "seafarer" by excluding from the class of seafarers "persons otherwise engaged in a maritime trade."

Yamaha, and the difficulty weighing the desire to maintain general maritime uniformity while at the same time addressing the merits of state interests, has also caused conflicting decisions in maritime cases involving passengers, persons like self-employed maritime workers who are not seamen or longshoremen.

The Eleventh Circuit held that *Miles* applies in a case where the injured party is a non-seafarer

passenger. In *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997), the Eleventh Circuit relied on the general maritime uniformity principle and held maritime remedies exclusive. This case involved a train that derailed into Bayou Cavot (Alabama waters) near Mobile, Alabama after a tow hit a railroad bridge. More than 100 suits for personal injury and death were filed by the railroad passengers. The federal district court ruled punitive damages under Alabama law were available. *Id.*, at 1424. The Eleventh Circuit refused to assume "that the holding in *Yamaha* embodies an unspoken rule that state interests must always trump competing admiralty principles when the two collide in state territorial waters." *Id.*, at 1425. Rather, "conflicts of this type must be resolved with a healthy regard for the needs of a uniform maritime law." *Id.* The Eleventh Circuit believed the *Yamaha* court was "intent on protecting the state interests that were present in that particular case (a product liability action resulting from a recreational boating accident in territorial waters)," but added the Supreme Court

> was not concerned with overruling bedrock admiralty principles recognized in *Southern Pacific Co. v. Jenson*, where the Court held that state law must yield if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.*, at 1424-25 (quoting *Southern*

Pacific Co. v. Jenson, 244 U.S. 205, 216 (1917)).

With this understanding of *Yamaha*, the Eleventh Circuit held that "the actors in this case are entitled to the application of a body of laws – maritime laws – that have been fitted over the years for just these types of situations." *Id.*, at 1426-27. Therefore, despite the fact that the railroad passengers were not seamen, longshore workers, or persons otherwise engaged in a maritime trade, the Eleventh Circuit crafted substantive maritime law to hold that maritime uniformity was paramount and controlled over state interests.

Other decisions across the country, even those within the same circuit, are inconsistent. In *Friedman v. Cunard Line Ltd.*, 996 F. Supp. 303 (S.D.N.Y. 1998), husband and wife filed suit under the general maritime law against a cruise ship operator seeking non-pecuniary damages following the wife's shipboard injury. Defendant moved for summary judgment seeking dismissal of the non-pecuniary damages. The court granted the motion by finding that supplementation of the general maritime law with state remedies would disrupt general maritime uniformity. *Id.*, at 312. Also, if a shipboard incident involved both ships' crew and passengers, with both seeking non-pecuniary damages, the court reasoned it would be anomalous to allow the passengers a remedy not available to the families of seamen on board the same vessel. On the other hand, in *Saunders v. Cunard Line*

Ltd., 1995 WL 329323 (S.D.N.Y. 1995), a pre-*Yamaha* decision, the court reached the opposite result.

Another district court in the Second Circuit held punitive damages under general maritime law, or under state law as a supplement to federal remedies, were not available to a passenger assaulted by a crewman. *O'Hara v. Celebrity Cruises, Inc.*, 979 F. Supp. 254 (S.D.N.Y. 1997). The holding was based upon the policy of promoting uniformity even though the case did not fall within the purview of the Jones Act or the Death on the High Seas Act. The court reasoned that the matter involved the kind of maritime conduct those statutory provisions rejected. The court noted *Yamaha* left unanswered the question whether punitive damages, as opposed to some other kind of damages, were available.

On the other hand, an opposite decision was rendered in *Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241 (S.D.N.Y. 2001), appeal dismissed, 333 F.3d 355 (2d Cir. 2003) (on procedural grounds), in which punitive damages were awarded.

Fifth Circuit district courts have also rendered inconsistent decisions post-*Yamaha*. In *In re Diamond B. Marine Services*, 2000 WL 805235 (E.D. La. 2000), loss of society and punitive damages were not recoverable for injury or death of passengers. However, a different result was reached in *In re Plaquemine Towing Corp.*, 190 F. Supp. 2d 889 (M.D. La. 2002). The court held that *Miles* did not apply to non-seamen ferry boat passengers. Additionally, the court relied

on *Yamaha* when it held that "due to the fact that the ferryboat passengers in this case are not seamen and are not covered by any of Congress' maritime statutes, under *Yamaha* their spouses' claims for loss of consortium are governed by general maritime law and supplemented by any applicable Louisiana state law." *Id.*, at 893.

A Fourth Circuit district court held that a passenger could pursue damages for loss of society and punitive damages. *Hester v. Cottrell Contracting Corp.*, 2001 WL 1764200 (E.D.N.C. 2001).

* * *

The cases cited illustrate inconsistency applying *Yamaha* and the general maritime uniformity/applicability of state law analysis in our federal and state courts. The inconsistency involves not only different theories determining when the general maritime policy of uniformity is paramount or subservient to the applicability of state law remedies, but also involves two different interpretations of who is a seafarer.

This Court noted in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), that the lack of guidance from the Supreme Court "has led the lower courts to a 'myriad of standards and lack of uniformity.'" *Id.*, at 353 (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seamen Status Reconsidered*, 24 S. Tex. L. J. 431, 494 (1983)). Today, as proven by the inconsistent federal and state decisions rendered since *Yamaha*, our maritime jurisprudence is a myriad of

standards and represents a lack of maritime uniformity. The time is ripe for this Court to address the uncertainty created by *Yamaha* and end the conflicting decisions which have a dramatic impact on all maritime workers and vessel owners.

D. Hypothetical Anomalies Exemplify The Problems Created By *Yamaha*

Assume for argument sake that self-employed commercial fishermen, maritime workers who are not seamen or longshore workers, are excluded from the class of persons deemed "seafarers" in *Yamaha* as the court below held. Consider the following hypotheticals which create anomalies.

Hypothetical #1:

A self-employed commercial fisherman and his deckhand employee are killed in territorial waters while aboard the self-employed fisherman's personally owned fishing vessel. The deckhand, as an employee of the self-employed commercial fisherman working on a vessel in navigation, is a Jones Act seaman, and thus a "seafarer". His personal representative is precluded from recovering state remedies. On the other hand, the self-employed commercial fisherman is not a Jones Act seaman or longshore worker, and thus his personal representative is able to recover state law remedies.

Hypothetical #2:

Two commercial fishing vessels, each with a single crew member, collide in territorial waters causing the death of the commercial fisherman on each vessel. Vessel A is owned and operated by ABC Fishing Boat Company, which employed decedent number one. Vessel B is owned and operated by decedent number two, a self-employed commercial fisherman engaged in his trade at the time of his death. Based upon the hypothetical, decedent number one is a Jones Act seaman and his personal representative is subject to exclusive general maritime law remedies. On the other hand, decedent number two's personal representative may recover state wrongful-death remedies since decedent number two is a non-seafarer.

These hypothetical anomalies highlight the inconsistencies in our current state of maritime law involving the death of persons engaged in a maritime trade in territorial waters. Because the problems stem from different interpretations of this Court's *Yamaha* decision, additional litigation in the lower courts is most unlikely to lead to further clarity. Without a definitive resolution from this Court, maritime workers and vessel owners will continue to grapple with the uncertainty which will fuel further inconsistent rulings.

III. The Decision Below Is In Conflict With Federal Decisions and Erroneously Concludes State Interests Are Paramount Over Maritime Uniformity

The Louisiana First Circuit Court of Appeal failed to recognize that maritime uniformity is paramount over state interests in a commercial maritime collision case involving persons who are engaged in a maritime trade.

1. *Yamaha* did not dispel the principle of maritime uniformity applicable for persons who are engaged in a maritime trade but are not seamen or longshore workers, as the Louisiana First Circuit concluded in *Trinh*, 6 So.3d at 841-42. The First Circuit surmised that use of the term persons otherwise engaged in a maritime trade "closely parallels the language in Section 902 [of the LHWCA] and supports a conclusion that the Supreme Court did not intend the holdings in *Yamaha's* opinion to extend to general maritime wrongful-death actions of decedents such as Thuan." *Id.*, at 841. This statement by the court below reflects sheer conjecture as to this Court's intent. Moreover, the conjecture continued when the Louisiana First Circuit found noteworthy that "seafarer" was utilized just twice in *Yamaha*, and that this Court utilized "seafarer" only in reference to employees falling under the scope of the Jones Act and LHWCA, as another reason to trump maritime uniformity in favor of state interests. *Id.* The Louisiana First Circuit found nothing in *Yamaha* to suggest this Court intended the language in

Yamaha's second paragraph, which set forth the case's holding, to extend the maritime tort recovery scheme beyond seamen and longshoremen.[3] As a result, the First Circuit incorrectly concluded "*Yamaha* [did] not create a general maritime rule clearly applicable to the instant matter." *Id.*

2. The Louisiana First Circuit Court of Appeal erred by failing to follow the precedent of three federal decisions directly on point.[4] Those three decisions discussed above dealt with self-employed commercial fishermen engaged in their maritime trade at the time of the casualty in territorial waters. The federal cases all cited *Yamaha* as holding that a commercial fisherman engaged in a maritime trade is a seafarer. These cases, involving commercial maritime workers, are different from those involving recreational boaters and recreational fishermen who are not engaged in a commercial maritime trade. The court below erred by failing to recognize the difference and interpret the clear intent of *Yamaha*.

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[3] The Louisiana court's creativity caused a misinterpretation of the phrase, "**or** person otherwise engaged in a maritime trade" which unequivocally sets forth a third class of seafarer status (emphasis added).

[4] *See, e.g., In re Goose Creek Trawlers, Inc.*, 972 F. Supp. 946 (E.D.N.C. 1997) (self-employed commercial shrimper held a seafarer under *Yamaha*); *In re Complaint of Stone Energy Corp.*, 2003 WL 21730621 (E.D. LA. 2003) (self-employed commercial crabber held a seafarer under *Yamaha*); and, *Savoie v. Chevron Texaco*, 2005 WL 2036740 (E.D. La. 2005) (self-employed commercial fisherman held a seafarer under *Yamaha*).

3. Near the end of its discussion on the non-pecuniary issue, the Louisiana First Circuit indirectly admitted the *Yamaha* decision created uncertainties over the scope of seafarer which reflect the recurring problems on which this Petition is based. In its decision, the First Circuit said:

> Until such time as Congress or the United States Supreme Court sees fit to address this situation, we see no reason to find the *Miles* damages uniformity principle precludes a Louisiana state court from supplementing general maritime law with Louisiana law that allows for the recovery of non-pecuniary damages in a wrongful death action of a decedent such as Thuan. . . . Accordingly, we find that the *Miles* damages uniformity principle is not applicable in this matter. *Id.*, at 843-44.

By this statement, the Louisiana First Circuit recognized it was speculating *Yamaha's* intent not only in regard to the analysis of maritime uniformity, but also in regard to whether a person engaged in a maritime trade is a seafarer. The First Circuit's creativity eschews the long-standing maritime principle of uniformity recognized by this Court in commercial maritime actions like this one. The Louisiana First Circuit invited this Court to clarify the scope of seafarer for all courts, both federal and state, as well as all litigants, both plaintiffs and defendants, and announce whether a person engaged in a maritime trade, who is not a seaman or a longshore worker, is a "seafarer" under *Yamaha*, which would require

application of maritime uniformity and maritime remedies over state interests and state remedies in a maritime wrongful-death case in territorial waters.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 2009

6 So.3d 830

Court of Appeal of Louisiana,
First Circuit.
Nga TRINH, Individually and on
Behalf of Hao TRAN and Lynn Tran
v.
DUFRENE BOATS, INC.
No. 2008 CA 0824.

Jan. 22, 2009.
Writ Denied April 13, 2009.

John Blackwell, New Iberia, LA, for Plaintiffs/Appellees, Nga Trinh, Individually and on Behalf of Hao Tran and Lynn Tran.

Scott R. Wheaton, Jr., Stanley J. Cohn, Gregory C. Fahrenholt, New Orleans, LA, for Defendant/Appellant, Dufrene Boats, Inc.

Before PETTIGREW, McDONALD, and HUGHES, JJ.

McDONALD, J.

In this case, plaintiffs sought recovery under general maritime law and Louisiana wrongful death and survival laws for the death and pre-death suffering of a Louisiana self-employed commercial crab fisherman, who was killed in Louisiana territorial and navigable waters when a barge being pushed by a tug boat struck his crab boat. The trial court found the defendant, who owned and operated the tug boat, 60 percent at fault and the decedent 40 percent at fault for the incident, awarded plaintiffs pecuniary and

nonpecuniary damages, and taxed costs to the defendant. The defendant appealed and the plaintiffs answered the appeal and urged the trial court erred in assigning fault to the decedent and by awarding only minimal survival damages. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The decedent, Thuan Tran, was a self-employed crab fisherman who died as a result of a maritime accident in Louisiana navigable waters. In March 2004, Thuan moved to New Iberia to work as a crab fisherman. He bought a crab boat fitted with a metal crab rack and crab traps, and Thuan and his wife, Nga Trinh, began preparing the boat and traps for commercial crabbing. Around April 24, 2004, local crab fishermen, Lac Le (Lac) and Hoc Tran (Hoc), took Thuan out in his boat from the dock at Jay's Seafood in Louisa and showed him how to get to several crabbing locations in the bay via the Intracoastal Waterway Canal ("Intracoastal Canal") and the Ivanhoe Canal.

In the early morning hours of April 27, 2004, Thuan and Hoc set out in Thuan's crab boat from Jay's Seafood to set out Thuan's crab traps in the bay for the first time. Around 8:30 a.m., another local fisherman, Quang Nguyen (Quang), who was collecting crab traps in the bay and knew Thuan, saw Thuan's boat as it passed, heading in an eastbound direction towards the Ivanhoe Canal. Thuan called

Quang on the CB radio and told Quang that he was headed in to get more crap [sic] traps. Quang did not see Thuan's boat again.

Around 9:00 a.m., Lac talked to Thuan by cell phone. Thuan reported that everything was going fine, he and Hoc had set out all of the crab traps, and they were returning to Jay's Seafood to pick up more traps. During the conversation, Thuan told Lac that they were nearing a landmark in the Ivanhoe Canal where it meets the Intracoastal Canal. This was the last contact anyone had with Thuan.

Thuan's crab boat never returned to Jay's Seafood. Later that day, local authorities and fishermen began searching the area waterways for Thuan and Hoc. The next day police found debris, including blue painted wood, and several items that Lac and Quang identified as coming from Thuan's boat. Sadly, Thuan's body was recovered on April 29, 2004, and Hoc's body was found the next day. An autopsy revealed that Thuan asphyxiated due to drowning, and that he had postmortem propeller injuries to his upper and lower extremities and scalp. Days later, authorities located and recovered Thuan's submerged boat in the Intracoastal Canal.

Authorities investigated the accident. At the time Thuan was last heard from, the only other marine traffic underway in the Ivanhoe Canal area of the Intracoastal Canal was the westbound M/V John 3:16 tug boat that was pushing a tow of six empty barges. Dufrene Boats, Inc. owned and operated the M/V

John 3:16. Authorities located the forward starboard barge in the tow, CC-95151, and found blue and white paint scrapings on the starboard front rake of the barge. Iberia Parish Sheriff's Office crime scene investigator, Deputy Robert Green, took photos of barge CC-95151 and samples of the paint scrapings for analysis and comparison with paint samples taken from the recovered pieces of Thuan's boat. The paint samples were identical.

Nga Trinh, individually and on behalf of her minor children, Hao Tran and Lynn Tran, brought a wrongful death and survival action against Dufrene seeking recovery of pecuniary and nonpecuniary damages. The plaintiffs alleged that Dufrene negligently operated the M/V John 3:16 causing barge CC-95151 to collide with Thuan's boat which resulted in Thuan's death. Conversely, Dufrene denied any liability for Thuan's death arguing that the minimal amount of paint scrapings and the location of those scrapings on the starboard rake of CC-95151 showed that Thuan's boat was not upright when CC-95151 came into contact with it. Dufrene contends that whatever caused Thuan's boat to be in that position also caused Thuan's death.

As to the plaintiffs' request for nonpecuniary damages, Dufrene filed a motion for partial summary judgment seeking dismissal of those damages, contending that nonpecuniary damages are not recoverable under general maritime law for a wrongful death of a commercial fisherman. The trial court denied Dufrene's motion for partial summary judgment,

finding that general maritime law and federal substantive maritime law do not preclude recovery of nonpecuniary damages for the wrongful death of a self-employed commercial fisherman in territorial waters, and that the Louisiana wrongful death statute allows for recovery of nonpecuniary damages. Dufrene applied for supervisory writs and this court declined to exercise its supervisory jurisdiction.[1]

The trial court conducted a three day bench trial in November 2007. Evidence and testimony concerning paint colors on Thuan's boat, paint transfer from the crab boat to barge CC-95151, and the chemical analysis of the paint samples taken from the two vessels were presented. Pictures of the barge and the salvaged crab boat also were introduced into evidence. As there was no issue that at some point barge CC-95151 struck Thuan's boat, the issue of Dufrene's potential liability for Thuan's death came down to a determination of whether the crab boat was in an upright or inverted position when the barge struck it. Dufrene contended that if the boat was upside down at the time that CC-95151 came into contact with the boat, then some other event was responsible for Thuan's death.

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[1] By majority vote, this court declined to exercise its supervisory jurisdiction over the interlocutory judgment in Docket No. 2007 CW 0827. Judge Parro dissented and stated that he would grant the writ.

As there were no eye witnesses to the event, the parties offered opposing expert opinion testimony on this issue. Plaintiffs' expert marine surveying witness, William Kyle, opined that the crab boat was upright and stopped when it was struck by the barge. Kyle based his opinion on his inspection of the damage to the crab boat, in particular the damage to the port side of the vessel, and his analysis of the scratches on the metal crab trap, railing, and fiberglass hull, the scrapes and filing down of the hull area of the boat, and the location of the blue painted wood on the crab boat. Conversely, Dufrene's expert, Norman Dufour, Jr., opined that the crab boat had to be upside down based on his inspection of the damage extending over a substantial portion of the port side of the crab boat and his review of the barge pictures showing a small amount of paint transfer, the height above the waterline of the paint, and the paint being found on only a limited portion of the barge. Neither Kyle nor Dufour physically examined the barge.

At the close of the trial, the trial court issued its findings. Based on the evidence presented, the trial court found that Thuan's boat was struck by Dufrene's barge. The trial court found that it was more likely than not that the crab boat was upright when struck by the barge, that Thuan was on the boat when it was struck, and that, for reasons unknown, Thuan's boat was stopped in the navigation portion of the Intracoastal Canal at the time it was hit.

As to liability, the trial court determined that both parties shared in the responsibility for the accident. The trial court found Thuan was 40% at fault because it was more likely than not that Thuan's boat was stopped in an area where it should not have been stopped and where larger vessels had the right-of-way. The trial court found that the M/V John 3:16 had a duty to maintain a proper lookout and to notice and avoid the stopped crab boat, and that the captain and crew should have seen the upright and stopped crab boat and avoided it. The trial court determined Dufrene was 60 percent at fault for the accident. The trial court determined the total nonpecuniary damages to be $1,000,000 and the total pecuniary to be $519,499, which included $15,000 for Thuan's survival damages. After reducing those amounts by the 40 percent fault allocated to the decedent, the trial court entered a judgment in favor of Nga Trinh for $545,399.40 in pecuniary and nonpecuniary damages and $183,150 in nonpecuniary damages for each of Thuan's two children. The trial court assessed costs to Dufrene. Dufrene appealed asserting five assignments of error. The plaintiffs answered the appeal, urging that the trial court erred in finding Thuan 40 percent at fault for the accident, and in setting the survival damages at an unreasonably low $15,000.

STANDARD OF REVIEW

State courts sitting in maritime cases apply state standards of review. *Winkler v. Coastal Towing, L.L.C.*, 2001-0399 (La.App. 1 Cir. 4/11/02), 823 So.2d

351, 356. The question of the applicability of state law raises a legal question, thus an appellate court need not give special weight to the findings of the trial court. *Id.* Louisiana appellate courts apply the manifest error – clearly wrong standard of review of facts in general maritime cases. *Terrebonne v. B & J Martin, Inc.,* 2003-2658 (La.App. 1 Cir. 10/29/04), 906 So.2d 431, 435. An appellate court cannot reverse factual findings unless it finds that no reasonable factual basis exists for the finding and that it is manifestly erroneous or clearly wrong. *Stobart v. State through Department of Transportation and Development,* 617 So.2d 880, 882 (La.1993). If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse. Consequently, where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Marie v. John Deere Insurance Company,* 96-1288 (La.App. 1 Cir. 3/27/97), 691 So.2d 1327, 1330.

ASSIGNMENTS OF ERROR

Three of Dufrene's assignments of error concern the trial court's factual finding that Thuan's boat was upright at the moment of impact with barge CC-95151. Dufrene argues that the trial court's finding is inconsistent with the physical evidence, which showed that the crab boat could not have been in an upright position when it came into contact with the barge. Dufrene contends that the opinion of plaintiffs'

expert, Kyle, was fatally flawed, because Kyle did not consider Deputy Green's photographs of the physical evidence on barge CC-95151 when he rendered his initial opinion that the boat was upright.

Based on our thorough examination of the record, we find that there is a reasonable factual basis in the record for the trial court's finding that Thuan's boat was upright at the time it impacted with barge CC-95151 and the collision resulted in Thuan's death. The evidence of paint transfer from the crab boat to barge CC-95151 established that at some point in time the two vessels came into contact with each other. The testimony of Captain Boudreaux, Lac and Quang, along with the April 27, 2004, captain's daily log sheet for the M/V John:3:16, placed the crab boat and CC-95151 in the same area of the Intracoastal Canal at the time that witnesses last saw or spoke to Thuan. The April 27, 2004, Louisa bridge tender's report and Captain Boudreaux's testimony established that the M/V John 3:16 was the only vessel underway in the Intracoastal Canal in the Ivanhoe Canal area at the time the crab boat was in that area.

As to the trial court's finding that Thuan's crab boat was in an upright position at the time of impact with barge CC-95151, the record shows that no one witnessed the impact between the crab boat and barge, and the parties presented conflicting expert opinion testimony to establish the position of the crab boat at the time of impact. In applying the manifest error standard, a trial court's credibility determinations are entitled to great deference. *See State ex rel.*

Thibodeaux v. State, 2001-2510 (La.3/8/02), 811 So.2d 875 (per curiam). The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. A fact finder may accept or reject the opinion expressed by an expert witness, in whole or in part. *Ryan v. Zurich American Insurance Company,* 2007-2312 (La.7/1/08), 988 So.2d 214, 222.

We find the testimony of the plaintiffs' expert, Kyle, did not contradict the objective evidence in the record and his opinion was plausible on its face. *See Ryan,* 988 So.2d at 222. We also find no merit to Dufrene's contention that Kyle's opinion was fatally flawed because he failed to take into consideration the paint scrapings on the barge, as Kyle's opinion did not change after he reviewed the photographs of the paint scrapings on barge CC-95151. At trial, Kyle explained that the crab boat's fiberglass hull was painted white above the waterline and green below the waterline, and the only blue paint he observed was on wood located in the helm area of the boat. The photographs of the paint scrapings on the barge showed white paint scrapings located under blue paint scrapings. Kyle testified the paint pattern on the barge was consistent with the paint pattern on the crab boat being in an upright position at the time of impact. Kyle also testified that there was no evidence of green paint scrapings on the barge, and he would have expected to see green paint scrapings from the boat's fiberglass hull on the barge if the boat

had been in an inverted position. If the boat were upside down, Kyle explained, there should not have been any blue paint scrapings on the barge, as the areas painted blue would have been under the waterline at the time of impact. Kyle's explanation is consistent with the laboratory report on the paint samples taken from barge CC-95151, as there were no samples of green paint scrapings from the barge submitted for analysis. Accordingly, we find a reasonable factual basis exists for the trial court's findings of fact and these assignments of error are without merit.

In conjunction with the above assignments of error, Dufrene asserts the trial court erred in taxing costs to a non-liable defendant. Louisiana Code of Civil Procedure art. 1920 governs the taxing of court costs. It reads:

> Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause.
>
> Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable.

While the assessment of costs may be made to reflect the percentage of negligence attributable to each party, the trial court may assess costs in any equitable manner pursuant to La.Code. Civ. P. art 1920. *Gauthier v. Wilson,* 2004-2527 (La.App. 1 Cir. 11/4/05), 927 So.2d 383, 390, *writ denied,* 2005-2402

(La.3/31/06), 925 So.2d 1258.[2] This article has been liberally interpreted as granting broad discretion to the trial court. Upon review, an appellate court will not disturb the trial court's fixing of costs absent an abuse of the sound discretion afforded the trial court. *Id.* In light of our ruling on the above assignments of errors, the premise for Dufrene's argument fails. Moreover, we find the trial court did not abuse its discretion in taxing Dufrene with all of the costs. The plaintiffs' claims in the underlying action resulted in a judgment rendered in a bench trial in favor of the plaintiffs based on a substantial assessment of fault against Dufrene. *See Gauthier,* 927 So.2d at 390 (finding the trial court did not abuse its discretion in casting all cost to a defendant found 60 percent at fault).

RECOVERY OF NONPECUNIARY DAMAGES

The trial court found the plaintiffs were entitled to pursue nonpecuniary damages under the Louisiana wrongful death law pursuant to *Yamaha Motor Corporation, U.S.A. v. Calhoun,* 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996), because Thuan was not a Jones Act seaman or a longshoreman covered by the Longshore and Harbor Workers' Compensation Act (LHWCA).

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[2] Nos. 2004-2527, 2004-2528, 2004-2529, 2004-2530, 2004-2531, 2004-2532, 2004-2533, 2004-2514

In its last assignment of error, Dufrene contends the trial court committed legal error, urging *Yamaha* restricts recovery of nonpecuniary damages in a general maritime wrongful death action to nonseafarers killed in state navigable waters and precludes such recovery when the decedent is a seafarer. Dufrene further contends that *Yamaha* identifies seafarers as, "a seaman, longshore worker, or person otherwise engaged in a maritime trade". Dufrene draws this conclusion from the second paragraph in the opinion that reads:

> Traditionally, state remedies have been applied in accident cases of this order – maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was **not a seaman, longshore worker, or person otherwise engaged in a maritime trade**. We hold, in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

Yamaha, 516 U.S. at 202, 116 S.Ct. at 621-22. (Emphasis added.)

Because Thuan's death occurred on Louisiana navigable waters and has a maritime nexus, this matter clearly falls within maritime jurisdiction. *See Giorgio v. Alliance Operating Corp.*, 2005-0002 (La.1/19/06),

921 So.2d 58, 66 (providing the test for admiralty tort jurisdiction). The United States Constitution grants to federal district courts jurisdiction in all "cases of admiralty and maritime jurisdiction." U.S. Const. art. III, section 2; *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 637 (La.1992), *cert. denied,* 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992). State courts have concurrent jurisdiction by virtue of the "savings to suitors" clause of the Judiciary Act of 1789. *Green,* 593 So.2d at 637; 28 U.S.C.A. § 1333 (1948). As a general proposition, a maritime claim brought in a state court is governed by the same principles as govern actions brought in admiralty, by federal maritime law. *See Giorgio,* 921 So.2d at 67. Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. *See Green,* 593 So.2d at 637-38; *see also Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La.7/2/96), 676 So.2d 89, 94.

However, general maritime law is not a complete or all-inclusive system. *Giorgio,* 921 So.2d at 67. When new situations arise that are not directly governed by federal legislation or admiralty precedent, federal courts may fashion a rule for decision by a variety of methods. For example, federal courts may apply state law to supplement the general maritime law when there is no conflict between the two systems of law, and the need for uniformity of decision does not bar state action. *Giorgio,* 921 So.2d at 67. The United States Supreme Court has made clear

that the uniformity principle does not preclude the application of state law in admiralty; rather, the decision whether to apply state law in cases within admiralty jurisdiction must be based upon balancing state and federal interests. *Giorgio,* 921 So.2d at 68. Louisiana state courts should respect Louisiana laws unless there is some federal impediment to the application of that law contained in federal legislation or a clearly applicable rule in the general maritime law. *Green,* 593 So.2d at 638.

We find that Louisiana has a strong interest in applying its own law in this case. The decedent and his family were Louisiana residents at the time of Thuan's death; the defendant, Dufrene, is a Louisiana corporation doing business in St. Mary Parish; the incident occurred on Louisiana navigable waters; and the maritime activities of Thuan's boat and the M/V John 3:16, on the day of the incident, started and were to end in Louisiana. Also, the Louisiana wrongful death statute, La. Civ. C. art. 2315.2, provides plaintiffs in the position of the instant plaintiffs with a remedy for recovering nonpecuniary damages in a wrongful death action.

Having determined that Louisiana has an interest in this matter, we must determine whether La. Civ. C. art. 2315.2 may supplement general maritime wrongful death law. In *Green*, the Louisiana Supreme Court provided a three-step process that state courts must use to analyze the balance of state and federal interest in an admiralty jurisdiction case. *See Green,*

592 So.2d at 639; *Giorgio,* 921 So.2d at 72. This three-step analysis entails determining whether there is applicable federal legislation, identifying the characteristic features of maritime law, and examining the scope of the uniformity requirement. *Id.*

Green Analysis-First Step

The parties do not contend that Thuan's death falls within the scope of the Jones Act or other federal maritime wrongful death statutes. Accordingly, we proceed to the second step to identify the characteristic features of maritime law and determine whether there is a clearly applicable general maritime rule that precludes applying the Louisiana wrongful death statute under the facts of this case.

Green Analysis – Second Step

Dufrene contends *Yamaha* creates a clearly applicable rule that precludes recovery of nonpecuniary damages under the facts of this case. Dufrene characterizes *Yamaha* as creating "an exception that allows non-pecuniary damages for 'nonseafarers' under general maritime law", thus precluding recovery of non-pecuniary damages for seafarers. Dufrene argues that Justice Ginsberg's inclusion of "person otherwise engaged in a maritime trade", in *Yamaha*'s second paragraph, along with "seaman" and "longshore worker" evidences the Supreme Court's intent to categorize decedents, such as Thuan, as a "seafarer". In support of this position, Dufrene cites three federal

district courts cases, two from the federal district court for the Eastern District of Louisiana and one from the federal district court for the Eastern District of North Carolina, interpreting *Yamaha* as precluding recovery of nonpecuniary damages, under general maritime law, in actions involving the injury or death of a self-employed commercial fisherman. *See Savoie v. Chevron Texaco,* 2004-1302, 2005 WL 2036740 (E.D.La.2005); *In re Complaint of Stone Energy Corp.,* 2002-2969, 2002-3189, 2003 WL 21730621 (E.D.La.2003) (unpublished); *Matter of Complaint of Goose Creek Trawlers, Inc.,* 972 F.Supp. 946 (E.D.N.C.1997).

We begin our analysis by examining *Yamaha* to determine if it governs this matter. In *Yamaha*, a 12 year-old Pennsylvania girl on vacation with her parents in Puerto Rico, was killed while operating a recreational jet ski in Puerto Rican territorial waters. The parents of the girl filed an admiralty action in a Pennsylvania federal district court seeking recovery from the jet ski manufacturer, Yamaha, under Pennsylvania's survival and wrongful death statutes, including recovery of loss of the child's future earnings, loss of society, loss of support and services, funeral damages, and punitive damages. Yamaha filed a motion for partial summary judgment asserting that the federal maritime wrongful death action recognized in *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 329 (1970), displaced all remedies afforded by state law, and that the plaintiffs could only recover the child's funeral expenses. The district court found the *Moragne*

maritime death action displaced state remedies, but that loss of society and loss of support and services were compensable under *Moragne*. *Yamaha,* 516 U.S. at 203, 116 S.Ct. at 622.

The United States Third Circuit granted certiorari on the issue of whether federal maritime law displaced state wrongful death and survival statutes and held that federal admiralty law, as articulated both by statute and by the federal common law, does not preempt the application of state law wrongful death and survival acts in actions based on the death of recreational boaters (nonseamen) in territorial waters. *Calhoun v. Yamaha Motor Corporation, U.S.A.,* 40 F.3d 622, 626, 637, 639, 644 (1994); *cert. granted in part,* 514 U.S. 1126, 115 S.Ct. 1998, 131 L.Ed.2d 999, *affirmed,* 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996).

Following that ruling, the Supreme Court granted certiorari on the following issue. "Does the federal maritime claim for wrongful death recognized in *Moragne* supply the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters?" *Yamaha,* 516 U.S. at 205, 116 S.Ct. at 623. The Supreme Court explained in a footnote that by "nonseafarers" it meant "persons who are neither seamen covered by the Jones Act, 46 U.S.C.App. § 688 (1988 ed.), nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*" *Yamaha,* 516 U.S. at 205 n. 2, 116 S.Ct. at 623 n. 2. The Supreme Court provided a lengthy analysis of federal maritime statutes,

traditional maritime common law policies and concepts, and its rulings in prior admiralty cases involving the availability of state law remedies in cases where federal maritime statutes provide rules that govern certain aspects of the liability in those cases. The decedents in the wrongful death cases analyzed in *Yamaha* were Jones Act seamen, workers covered under LHWCA, or decedents killed on the high seas that fell within the scope of the Death on the High Seas Act, 46 U.S.C.App. § 761 et seq. (DOHSA).

From its analysis, the Supreme Court determined, "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." *Yamaha,* 516 U.S. at 215, 116 S.Ct. at 628. Taking into account what Congress sought to achieve, the Supreme Court preserved "the application of state statutes to deaths within territorial waters." *Yamaha,* 516 U.S. at 216, 116 S.Ct. at 628. Ultimately, the Supreme Court answered the question it fashioned, holding "damages available for the jet ski death of Natalie Calhoun are properly governed by state law." *Yamaha,* 516 U.S. at 216, 116 S.Ct. at 629.

We find particularly important that in framing the question presented in *Yamaha*, the Supreme Court introduced the term "nonseafarer", defining a "nonseafarer" as "persons who are neither seamen covered by the Jones Act . . . nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act." By defining "nonseafarer" in this manner, it is clear that a Jones Act seaman and a longshore worker under the LHWCA are seafarers.

The LHWCA covers a range of nonseaman, longshore employees. Section 902 of the LHWCA defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker". 33 U.S.C.A. § 902. The reference to "longshore worker, or person otherwise engaged in a maritime trade", in the second paragraph of *Yamaha*, closely parallels the language in Section 902 and supports a conclusion that the Supreme Court did not intend the holdings in *Yamaha*'s opinion to extend to general maritime wrongful death actions of decedents such as Thuan.

In further examining the intended scope of *Yamaha*, we find that "seafarer" appears just twice in the opinion. It first appears during the discussion of the maritime doctrine of unseaworthiness and how its development into a strict-liability rule played a role in the recognition of a wrongful death action in general maritime law. The Supreme Court stated, "[t]he unseaworthiness doctrine thus became a 'species of liability without fault,' and soon eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed." (citation omitted). *Yamaha,* 516 U.S. at 208, 116 S.Ct. at 625 (citing *Miles v. Apex Marine Corp.,* 498 U.S. 19 at 25-26, 111 S.Ct. 317 at 321-22, 112 L.Ed.2d 275). "Seafarer" appears again in a footnote explaining how the *Moragne* wrongful death action provided longshore workers access to the doctrine of unseaworthiness

that was available to true seamen covered under the Jones Act. The Supreme Court stated, "[t]hus, nothing short of a federal maritime right of action for wrongful death could have achieved uniform access by seafarers to the unseaworthiness doctrine, the Court's driving concern in *Moragne*." *Yamaha,* 516 U.S. at 213 n. 10, 116 S.Ct. at 627 n. 10 (citing *Moragne,* 398 U.S. at 396 n. 12, 90 S.Ct at 1785 n. 12). In tracing the term "seafarer" to *Miles* and *Moragne*, we find the Supreme Court uses the term "seamen" rather than "seafarer" in those opinions, and additionally, those cases involve the deaths of a Jones Act seaman and a LHWCA harbor worker. Thus, we find that the *Yamaha* opinion used the term "seafarer" in the context of providing uniform access to the unique maritime doctrine of unseaworthiness among the classes of maritime employees covered under the Jones Act and LHWCA.

Finally, we note that the second paragraph in *Yamaha* specifically references, with approval, the *Yamaha* appellate opinion. The Supreme Court stated, "[w]e hold in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in *Moragne*." *Yamaha,* 516 U.S. at 202, 116 S.Ct. at 621-22. The Third Circuit did not use the term "seafarer" in its appellate opinion. Also, the appellate opinion did not discuss displacement of state law remedies in general maritime wrongful death actions of decedents whose

deaths did not fall within the scope of the Jones Act, the LHWCA, or other federal maritime tort recovery scheme. *See Calhoun,* 40 F.3d 622.

We can find nothing in *Yamaha*, or the cases cited therein, to suggest the Supreme Court intended the language in the second paragraph of the opinion to extend the holdings or dicta in *Yamaha* to decedents not covered by a federal maritime wrongful death tort recovery scheme. Accordingly, we find *Yamaha* does not create a general maritime rule clearly applicable to the instant matter.

As to the lower federal cases relied upon by Dufrene, the Louisiana Supreme Court has held that in matters involving federal law, state courts are bound only by decisions of the United States Supreme Court. Federal appellate court decisions are persuasive only. *Shell Oil Company v. Secretary, Revenue and Taxation,* 96-0929 (La.11/25/96), 683 So.2d 1204, 1210 n. 11. While not bound by the decisions in these lower federal court cases, we look to them to see if they provide any guidance in the instant matter.

We find the three federal district court cases cited by Dufrene are unpersuasive in resolving the issues presented in this appeal. These federal court cases found self-employed commercial fishermen, who were injured or killed in state waters, were "seafarers" under *Yamaha* because they were "[persons] otherwise engaged in a maritime trade". These cases give no importance to *Yamaha*'s specific definition for "nonseafarer," because the definition is found in a

footnote and not in the body of the opinion. Considering that *Yamaha*'s maritime policy and case analysis focused on circumstances where liability in a maritime wrongful death action could also evoke liability under the Jones Act, LHWCA, or DOHSA, we find these lower federal court cases fail to properly consider the language in *Yamaha*'s second paragraph in the context of the opinion as a whole. Also, we find these cases do not clearly identify any admiralty policy, principle, or rule that would be served by precluding application of state law under the facts of this case. Accordingly, we find no clearly applicable general maritime rule that precludes applying the Louisiana wrongful death statute in this matter.

Green Analysis – Third Step

The last step of the *Green* analysis requires analyzing the scope of the uniformity requirement. Generally, when Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is no cause for enlargement of damages statutorily provided. *Yamaha*, 516 U.S. at 215, 116 S.Ct. at 628 (citing *Miles*, 498 U.S. at 30-36, 111 S.Ct. at 324-28). In *Miles*, the Supreme Court articulated a damages uniformity principle that precluded recovery of nonpecuniary damages in general maritime wrongful death actions of Jones Act seamen. *Miles*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275.

In *Rebardi v. Crewboats, Inc.*, 2004-0641 (La.App. 1 Cir. 2/11/05), 906 So.2d 455, 458-460, this court

cited, with approval, the United States First Circuit's analysis of *Miles* in *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 700-702 (1 Cir.1995), in determining whether *Miles* precluded recovery of punitive damages in an admiralty case. The *CEH* court reviewed the approach used in *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506 (5 Cir.1995) (en banc) to determine whether the *Miles* damages uniformity principle governed the facts of an admiralty case. The *Guevara* court first determined whether the factual setting of the case was covered by a statute like the Jones Act or DOHSA. *Rebardi,* 906 So.2d at 459 (citations omitted). Then, upon finding a statutory/general maritime law overlap, the court invoked the *Miles* damages uniformity principle and excluded punitive damages. *Id. Guevara* illustrates that *Miles* may be applicable in those areas of maritime law where, at the very least, there is an overlap between statutory and decisional law. *Id.*

The *CEH* court concluded that the uniformity concern expressed in *Miles* was not with respect to an award of nonpecuniary damages in maritime cases in general, but with inconsistency with Congressional pronouncement. *See Rebardi,* 906 So.2d at 460 (citations omitted). The *CEH* court concluded *Miles* does not mandate a uniform result for every maritime action and was hesitant to ascribe to the Supreme Court a holding that goes well beyond any issue discussed there. *Id.* In the absence of any relevant legislation, the *CEH* court concluded that the uniformity principle enunciated in *Miles* was inapplicable.

Id. Applying those articulated principles to the facts presented in *Rebardi*, this court found the case was neither a Jones Act nor a DOHSA case and, in the absence of any relevant legislation, held that the uniformity principle enunciated in *Miles* was inapplicable. *Rebardi,* 906 So.2d at 461.

We find that the approach we used in *Rebardi* applies to our analysis of the *Miles* damages uniformity principle in this case. As previously noted, there is no dispute that facts surrounding Thuan's death and the plaintiffs' wrongful death action under general maritime law do not overlap with the tort recovery regimes provided by the Jones Act, the LHWCA or the DOHSA. Accordingly, we find no Congressional remedial scheme prohibits the award of nonpecuniary damages in a general maritime wrongful death action of a local self-employed fisherman killed in Louisiana waters. We recognize that there may be some circumstances, such as in a wrongful death action of a Jones Act seaman against a non-employer, third-party defendant, that are not directly covered by the Jones Act or DOHSA but are so highly analogous factually to a Jones Act wrongful death action that the *Miles* damages uniformity principle may preclude application of state law remedies. *See Scarborough v. Clemco Industries,* 391 F.3d 660, 668 (5 Cir.2004); *cert. denied,* 544 U.S. 999, 125 S.Ct. 1932, 161 L.Ed.2d 772 (2005). However, we find that the circumstances of this case are not highly analogous factually to a wrongful death action created under any federal maritime statutory scheme.

Until such time as Congress or the United States Supreme Court sees fit to address this situation, we see no reason to find the *Miles* damages uniformity principle precludes a Louisiana state court from supplementing general maritime law with Louisiana law that allows for the recovery of nonpecuniary damages in a wrongful death action of a decedent such as Thuan. *See Rebardi,* 906 So.2d at 461. Accordingly, we find that the *Miles* damages uniformity principle is not applicable in this matter.

In sum, we find Louisiana has a substantial interest in applying its laws in a case involving the death of a Louisiana crab fisherman in Louisiana navigable waters. The defendant is a Louisiana corporation, the facts occurred solely in Louisiana, and Louisiana is where the plaintiffs resided at the time of the death and when suit was initiated. Applying Louisiana wrongful death law in this matter will not conflict with specific federal maritime law or with the characteristic features of maritime law, nor would the application of Louisiana wrongful death law interfere with federal uniformity requirements, as the liability resulting from Thuan's death does not fall within any Congressionally created maritime statutory regime limiting the type of damages that are recoverable. Accordingly, we affirm the trial court judgment awarding nonpecuniary damages in favor of the plaintiffs and against Dufrene.

PLAINTIFFS' ANSWER ON APPEAL

In answering Dufrene's appeal, plaintiffs assert that the trial court erred in finding Thuan 40 percent at fault for the incident, urging the record does not support this finding and that Dufrene did not allege Thuan's fault as an affirmative defense in its answer.

The determination and allocation of comparative fault are factual inquires that will not be disturbed absent manifest error or unless the court was clearly wrong. *Dupree v. City of New Orleans,* 99-3651 (La.8/31/00), 765 So.2d 1002, 1015. The trier of fact is owed great deference in its allocation of fault. Even if the reviewing court would have decided the case differently had it been the original trier of fact, the trial court's judgment should be affirmed unless manifestly erroneous or clearly wrong. *Id.* To the extent that a party defendant seeks to have the benefits of comparative fault of another as an affirmative defense, it bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause-in-fact of the damage being complained about. *Dupree,* 765 So.2d at 1015 n. 13.

Contrary to plaintiffs' assertion, the record reveals Dufrene did assert the decedent's fault as an affirmative defense in its answer. In answering, Dufrene alleged "[a]s a separate and complete defense . . . that the death of the decedent was not the result of any negligence on behalf of Dufrene . . . but was caused or contributed to by the fault and negligence of the decedent." We also find the trial court was not

manifestly erroneous or clearly wrong in finding Thuan 40 percent at fault in this matter. The facts introduced at trial establish that Thuan's crab boat was within the navigable channel of the Intracoastal Canal when it was struck by the barge, and expert testimony establishes that Thuan's boat was more likely than not in an upright position and stopped at the time of the incident.

Plaintiffs also contend that the $15,000 they received for Thuan's survival action is too low, as it is inconsistent with a finding that Thuan was comparatively at fault in this matter and request this court to increase the award to $100,000. A court may award damages for the pain and suffering of the decedent where there is the smallest evidence of pain on the part of the victim, by his actions or otherwise. *Magee v. Pittman,* 98-1164 (La.App. 1 Cir. 5/12/00), 761 So.2d 731, 750, *writ denied,* 2000-1694 (La.9/22/00), 768 So.2d 31. However, like other general damage awards, the amount awarded is subject to the vast discretion of the jury. *Id.*

As to the evidence of Thuan's pre-death damages, the evidence in the record supports the trial court's finding that Thuan was alive when he entered the water, as the post-mortem examination listed Thuan's cause of death as asphyxiation by drowning. The post-mortem examination also provides that the amputation of Thuan's arm and lower leg and the lacerations to his head and torso occurred after his death. The trial court also found that the lacerations to his head and torso occurred post-mortem. There is

no evidence establishing how long Thuan was in the water before he perished. However, that the trial court found that the impact of Thuan's modest crab boat with a barge being pushed, along with five other barges, by a tugboat caused Thuan to enter the water. Considering the sizes of the vessels involved, the finding that Thuan's boat was stopped at the time of impact, and the lack of evidence showing that Thuan remained conscious after the impact, we find that it was not manifestly erroneous for the trial court to award $15,000 to the plaintiffs for Thuan's survival damages.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court. All costs of this appeal are assessed to appellant, Dufrene Boats, Inc.

NGA TRINH, INDIVIDUALLY AND ON BEHALF OF HAO TRAN AND LYNN TRAN	:	DOCKET NO.: 114096, DIV. "B"
	:	16th JUDICIAL DISTRICT COURT
VERSUS	:	PARISH OF ST. MARY
DUFRENE BOATS, INC.	:	STATE OF LOUISIANA

JUDGMENT

(Filed Nov. 26, 2007)

This matter can [sic] on for a trial without jury on 6, 7 and 8 November, 2007.

PRESENT John Blackwell and Michael D. Lopresto for plaintiffs, Nga Trinh, individually and on behalf of Hao Tran and Lynn Tran

Stanley J. Cohn for defendant Dufrene Boats, Inc.

The Court having considered the law and the evidence, for reasons orally assigned, finding that the decedent Thuan Van Tran was 40% at fault and the defendant Dufrene Boats, Inc. was 60% at fault and determined that plaintiffs sustained damages as follows:

Property Damage	$ 6,000.00
Pecuniary Damages	
Past	$ 134,463.00
Future	$ 364,036.00
Survival Action	$ 15,000.00

Non-Pecuniary Damages	
Nga Trinh, individually	$ 400,000.00
Nga Trinh, on behalf of Hao Tran	$ 300,000.00
Nga Trinh, on behalf of Lynn Tran	$ 300,000.00

WHEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff Nga Trinh, individually against the defendant Dufrene Boats, Inc. in the amount of FIVE HUNDRED FORTY-FIVE THOUSAND THREE HUNDRED NINETY-NINE AND 40/100 ($545,399.40) DOLLARS with legal interest from this date.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff Nga Trinh on behalf of her minor child Hao Tran against the defendant Dufrene Boats, Inc. in the amount of ONE HUNDRED EIGHTY-THREE THOUSAND ONE HUNDRED FIFTY AND NO/100 ($183,150.00) DOLLARS with legal interest from this date.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Nga Trinh on behalf of her minor child Lynn Tran against the defendant Dufrene Boats, Inc. in the amount of ONE HUNDRED EIGHTY-THREE THOUSAND ONE HUNDRED FIFTY AND NO/100 ($183,150.00) DOLLARS with legal interest from this date.

IT IS FURTHER ORDERED that the defendant Dufrene Boats, Inc. be cast for all costs of court.

THUS DONE AND SIGNED this 21st day of November, 2007 in St. Martinville, St. Mary Parish, Louisiana.

/s/ Paul J. deMahy
HON. PAUL J. deMAHY
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ J.B.
John Blackwell for plaintiff

/s/
Stanley J. Cohn for defendant

16TH JUDICIAL DISTRICT COURT

NGA TRINH, INDIVIDUALLY, AND ON BEHALF OF HAO TRAN AND LYNN TRAN

VERSUS

DUFRENE BOATS, INC., ET AL

DOCKET NO. 114,096 **STATE OF LOUISIANA**
PARISH OF ST. MARY

APPEARANCES:

JOHN BLACKWELL
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COUNSEL FOR PLAINTIFF

STANLEY J. COHN, ESQ.
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COUNSEL FOR DEFENDANT

TRANSCRIPT OF TRIAL ON THE MERITS

(Filed Apr. 17, 2008)

Transcript of all proceedings had and the evidence adduced held in the above numbered and entitled cause on November 7 and 8, 2007, the Honorable Paul J. deMahy, Presiding Judge.

SHERRY A. BAYARD, CCR
– Official Court Reporter
Sixteenth Judicial District
State of Louisiana

* * *

COURT RULING

BY THE COURT:

Having reviewed the evidence, as said from the beginning, there's no question that the crab boat owned by the plaintiff was struck by the barge owned by the defendant. The question has always been, was the plaintiff in that boat at the time it was hit by the barge and was that the cause of his death. And, of course, since there are no witnesses, it's based on the physical evidence that was present on the barge and on the crab boat. Having reviewed that evidence and the testimony of the experts, I [139] feel more likely than not the crab boat was upright when struck by the barge. It was struck – well, a portion of the boat was struck by the rake of the barge. As I view the evidence and the physical evidence, it seems as though the crab boat was struck, not the initial contact between the crab boat and the barge was not – the port side of the barge did not strike the whole rake of the – the port side of the crab boat did not strike the whole rake of a barge. It was off – part of the crab boat was to the starboard side of the barge. And I find more likely than not that plaintiff was in his crab boat when it was struck and that was what ultimately resulted in his death.

The crab boat was stopped at the time it was hit. Why it was stopped is really, can only be speculated. However, whatever reason it was stopped, I feel that the plaintiff was responsible. If it was stopped because of mechanical failure, it's his boat and he's responsible for the boat having suffered mechanical failure. If it was stopped simply because he decided to stop his boat, if he stopped his boat in the navigation portion of the Intercoastal Canal which was, in which the larger boats had the right-of-way. Either way, he was, at the time of the collision, his boat was in the position where it should not have been, or in a position in which the larger boat had the right-of-way. However, because it was stopped there, the tug was overtaking it and had a responsibility to have a proper lookout and notice the boat and avoid it. I don't doubt that Mr. Boudreaux did not see the boat, nor his mate did not see the boat. However, their failure to see the boat does not absolve them of responsibility. They had a duty to observe the boat in their path and, as I said, more likely than not, it was sitting there dead in the water at the time of the [140] collision, so they should have seen it and avoided it.

Considering their duty and responsibilities, I find that both parties share some responsibility in the accident. They were both negligent in the operation of their vessel and their negligence, each of their negligence, negligent acts contributed to the collision. And, therefore, I assign to the plaintiff 40% of the fault, and to the defendant, 60% of the fault. There's no question the boat was valued at $6,000.00 and they

can recover for that. Half of that award goes to the spouse which was community property, and one-fourth each of that amount goes to the children. The loss of support for the past, I award the amount of $119,820.00. For the past loss of household services, $14,643.00. For the future loss of support, $299,871.00. For loss of future spousal services, $64,165.00. That is based on the work-life expectancy of the decedent, and I feel that is the appropriate measure of time rather than until he reaches the age to recover Social Security.

For the claim on the survival action, there's no evidence as to how long Mr. Tran, the decedent, was alive before, at the time of the accident. Based on the circumstances, I feel more likely than not the decedent did not see the barge before it struck and was probably rendered unconscious shortly after being struck, or at the time he got struck, so I think an award of $15,000.00 would be appropriate to be divided equally between the two children and the wife.

On the wrongful death non-pecuniary damage award, I feel the appropriate amount for the children would be $300,000.00 each, and for the wife, $400,000.00.

[141] **BY MR. COHN:**

Pardon?

BY THE COURT:

400. Interest from date of signing judgment until paid, and the defendant to pay the costs of the proceedings.

And Mr. Blackwell, will you be preparing the judgment?

BY MR. BLACKWELL:

Yes, Your Honor.

BY THE COURT:

Okay. Send a copy and then I'll hold it and sign it if there's no objections to the form.

BY MR. COHN:

Thank you, Your Honor.

BY MR. BLACKWELL:

Thank you, Your Honor.

(END OF PROCEEDING)

[Reporter's Certificate Omitted In Printing]

NHU TRAN AND SAI HONG	:	DOCKET NO.: 113230, DIV. "B"
VERSUS	:	16th JUDICIAL DISTRICT COURT
DUFRENE BOATS, INC.	:	PARISH OF ST. MARY
	:	STATE OF LOUISIANA

CONSOLIDATED WITH

NGA TRINH, INDIVIDUALLY AND ON BEHALF OF HAO TRAN AND LYNN TRAN	:	DOCKET NO.: 114096, DIV. "B"
VERSUS	:	16th JUDICIAL DISTRICT COURT
DUFRENE BOATS, INC.	:	PARISH OF ST. MARY
	:	STATE OF LOUISIANA

JUDGMENT

(Received and Filed Mar. 28, 2007)

This matter came before the Court on the 13th of March, 2007 for trial of the motion by defendant Dufrene Boats, Inc. for a partial summary judgment dismissing the non-pecuniary damage claims of Nga Trinh, the surviving spouse of Thuan Tran and on behalf of her minor children Hao Tran and Lynn Tran.

Present: Stanley J. Cohn for defendant Dufrene Boats, Inc.

John Blackwell and Michael D. Lopresto for plaintiffs Nga Trinh, surviving spouse of Thuan Tran on behalf of her minor children Hao Tran and Lynn Tran.

The Court having considered the law and the evidence, for reasons orally announced holding that under the United States Supreme Court case of *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619, 133 1 L. Ed. 2d 578 (1996), plaintiffs are entitled to pursue recovery of non-pecuniary damages pursuant to the Louisiana Wrongful Death Statute because the decedent Thuan Tran, a self-employed commercial crabber engaged in his profession on navigable waters in St. Mary Parish at the time of his demise was neither a Jones Act seaman nor a longshoreman covered by the Longshore and Harbor Workers' Compensation Act,

WHEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for partial summary judgment of Dufrene Boats, Inc. be and the same is hereby denied at the cost of defendant.

St. Martinville, Louisiana, this 29 day of March, 2007.

/s/ Paul J. deMahy
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ John Blackwell
JOHN BLACKWELL

/s/ Stanley J. Cohn
STANLEY J. COHN

16TH JUDICIAL DISTRICT COURT

NHU TRAN, ET AL

VERSUS

DUFRENE BOATS, INC.

DOCKET NO. 113,230 **STATE OF LOUISIANA**
PARISH OF ST. MARY

APPEARANCES:

JOHN BLACKWELL
MICHAEL LOPRESTO

COUNSEL FOR NHU TRAN, ET AL

STANLEY COHN
COUNSEL FOR DUFRENE BOATS, INC.

TRANSCRIPT OF COURT RULING

Transcript of all proceedings had and the evidence adduced held in the above numbered and entitled cause on March 13, 2007, the Honorable Paul J. deMahy, Presiding Judge.

[2] **PROCEEDINGS:**

BY THE COURT:

This case is controlled by the U. S. Supreme Court case of ***Yamaha Motor Corporation vs. Calhoun***, and there is a difference of opinion between the parties of this case as to how it should he applied to this case. The issue in that case, as stated by Justice Ginsburg, "Does the federal maritime

claim for wrongful death recognized in ***Moraigne*** [sic] supply an exclusive remedy in cases involving death of non-seafarers in territorial waters." The question, of course, in this case is whether the plaintiff's husband was a non-seafarer or a seafarer. Justice Ginsburg defined in the footnote 2, "By non-seafarers we mean persons who are neither seaman covered by the Tones Act, nor longshoreman workers covered by the Longshore Harbor Workers Act," and she goes through, and analyzes various cases to get to an answer to that question. And the answer is, that non-seafarers have a wrongful death claim for non-pecuniary damages, and I think everybody agrees with that. The question is, who is a non-seafarer. Justice Ginsburg defined who was a non-seafarer. If you are not covered by the Jones Act, you're not covered by Longshore Harbor Workers Act, you are a non-seafarer you have a wrongful death claim for non-pecuniary damages. That's the way I read it. They have three U. S. Supreme Court – three federal district judges that disagree with that, that expand the definition, or restrict the definition of non-seafarers further than Justice Ginsburg did. In the analysis, Justice Gingsburg mentioned that, "Federal Maritime Law has long [3] accommodated the state's interest in regulating maritime affairs within their territorial waters, and Congress has not prescribed remedies for wrongful deaths of non-seafarers in territorial waters." So there's no federal legislation regarding what can be recovered for the wrongful death of non-seafarers in territorial waters.

And based on that, I find that the decedent in this case is not a seafarer, is a non-seafarer because he's not covered by the Longshoreman Harbor Workers Act nor the Jones Act, therefore, his heirs have a wrongful death claim for non-pecuniary damages, and I'll deny summary judgment.

(END OF PROCEEDING)

[Reporter's Certificate Omitted In Printing]

5 So.3d 166

Supreme Court of Louisiana.
Nga TRINH, Individually and on Behalf of
Hao Tran and Lynn Tran
v.
DUFRENE BOATS, INC.
No. 2009-C-0406.

April 13, 2009.

Prior report: La.App., 6 So.3d 830.

In re Dufrene Boats, Inc.;-Defendant; Applying For Writ of Certiorari and/or Review, Parish of St. Mary, 16th Judicial District Court Div. B, Nos. 113230, 114096; to the Court of Appeal, First Circuit, No. 2008 CA 0824.

Denied.